

What You Don't Know Can Hurt You: a Shipper Takes the Rap for Hazmat Cargo It Had No Reason to Suspect was Dangerous

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The U.S. Court of Appeals for the Second Circuit, which sits atop the federal district courts of the northeastern states, recently socked it to a shipper which had every reason to think its nose was clean. Back in 1994, shipper Zen Continental Company booked a cargo of thiourea dioxide (TDO) from Korea to Norfolk, Virginia with carrier Senator Linie. At that time, TDO wasn't known to be a hazardous material, and didn't appear on international or U.S. federal government hazmat lists. In fact, studies showed it to be a stable compound. Nonetheless, Zen's barrel of fluffy white TDO spontaneously exploded on the *M/V Tokyo Senator*, setting fire to the vessel and other cargo. The damage tab was some \$440,000.00.

Senator Linie sued Zen in the U.S. District Court for the Southern District of New York. Zen went to the court, palms up, and successfully pleaded "gee, we didn't know the stuff was dangerous." The district court bought Zen's argument, and dismissed Senator's claims. The U.S. Carriage of Goods by Sea Act (COGSA), found the district court, doesn't hold shippers "strictly liable" for cargo they have no way of knowing was dangerous. Put simply, Zen did nothing wrong.

Fast forward eight years, and the Second Circuit hears Senator's appeal. To Zen's great surprise and dismay, the Court of Appeals reversed the lower court's decision, and found Zen liable to Senator for all damages resulting from the explosion. In doing so, the court rejected Zen's argument that earlier Second Circuit case law, created in a 1910 cargo case, specifically held shippers not strictly liable for cargo they have no reason to suspect is dangerous. Put simply again, it doesn't matter that you did nothing wrong; you're still liable.

In rejecting Zen's theory, the Second Circuit goes through an interesting, if circuitous and oblique, history lesson of the law of cargo liability. Contrary to Zen's contention, COGSA was not a statutory restatement (or "codification," in legal-ese) of American maritime court cases (a/k/a "the General Maritime Law"). Rather, it was a modified adoption of the Hague Rules, an internationally recognized liability regime Congress wanted to embrace (with restrictions) in 1936. COGSA's provisions regarding prior knowledge of a cargo's hazardous nature address only a carriers' right to dispose of the cargo, and have nothing to do with shipper liability. Significantly, Congress' stated goal in adopting COGSA was Uncle Sam's participation in internationally uniform rules of cargo liability, placing American legal precedents in the back seat.

Clearly uncomfortable with that 1910 case's black-and-white ruling, the court points to decisions from other circuits which reached the opposite conclusion, and noted that 1910

was earlier than 1936, when COGSA was adopted. Moreover, the statutory enactment would supplant conflicting judicial interpretations.

Add to the mix statements made by Norwegian delegates to the Hague Convention which, at a minimum, leave ambiguous whether strict liability is dependent on shipper foreknowledge; judicial decisions from England's House of Lords addressing similar issues; and some statutory interpretation principles beyond this article's scope. The result is Zen's inner peace and tranquility being disturbed to the tune of some half a million bucks.

What does this mean for shippers and intermediaries as a whole? Strict liability essentially creates circumstances whereby cargo owners, intermediaries and their insurers bear risks they can do little or nothing about. In other words, shippers get to pony up for damages they could not have prevented. Unfortunately, internationally accepted chemical studies won't get you off the hook. With a ruling on the books holding shippers strictly liable for circumstances they're not aware of, shippers might also be held liable for mishaps even if they have properly taken all recognized precautions to secure known hazmat cargo.

The Zen decision technically controls only the law of the northeastern states, but this kind of precedent typically has far-reaching influence. Moreover, it is in keeping with judicial leanings toward expanding responsibility for potentially catastrophic losses in this era of increased security consciousness. Zen represents new concerns for the shipper/intermediary side of the equation, but may also be part of a trend toward stricter industrial accountability.

Ref: Senator Linie GMBH & Co. v. Sunway Line, Inc., et al, 2002 WL 1011296 (2nd Cir. 2002)